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No. 6901

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

VIRGINIA IRENE THOMPSON,
PETITIONER

v.

THE COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF APPEALS FOR
THE COMMONWEALTH OF VIRGINIA

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Attorney for Petitioner

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Virginia Irene Thomson, Petitioner, through her counsel, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Appeals for the Commonwealth of Virginia entered June 16, 1970.

JUDGMENTS BELOW

The Supreme Court of Appeals for the Commonwealth of Virginia affirmed judgment below by denying Petition for Writ of Error on June 16, 1970. The Supreme Court of Appeals for the Commonwealth, however, did grant a stay of their Order contingent upon the filing of a Petition for a Writ of Certiorari by September 15, 1970. Said Order was without opinion.

JURISDICTION

The Order of the Supreme Court of Appeals for the Commonwealth of Virginia granted stay pending filing Petition for Certiorari to the Supreme Court of the United States. Two Constitutional questions of prime importance were raised in this case. First, that the statute under which the Petitioner was convicted, namely Section 18.1-58 of the Code of Virginia, is clearly and unequivocally an ex post facto law in that the punishment vested upon Petitioner was gauged upon an act committed prior to the enactment of the statute itself, thus making the statute in question a violation of Article I, Section 9 of the United States Constitution.

Further, Petitioner raises a second crucial Constitutional question, and that is that this statute applied against the petitioner specifically provides for criminal punishment for Petitioner being in a state of alcoholism. Petitioner asserts that this statute as applied to her is in violation of the 14th Amendment and 8th Amendment to the Constitution of the United States in that it vests upon her, a chronic alcoholic of more than ten years, a cruel and unusual punishment. This for a condition which, as related to the petitioner, is that of a medical disease. Wherefore, the jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether a state legislature may enact a criminal statute which provides that a person shall suffer additional punishments, including mandatory imprisonment, for acts committed by that person prior to the enactment of the statute, itself.

2. Whether a Commonwealth which licenses, taxes and engages in the sale of alcohol, may seek penal retribution against persons who by virtue of indulging in the consumption of said alcohol made available by the Commonwealth, became alcoholics. Whether that Commonwealth may punish persons for being nothing more than alcoholics, medical cripples, whose condition is brought about by the desire of that Commonwealth to make monetary gain from the direct sale of a substance known by them, and the world at large, to produce precisely the effect that they statutorily condemn and for which they seek criminal sanction.

STATUTES INVOLVED

Code of Virginia

Title 18.1 Crimes and Offenses Generally
§ 18.1-58 Penalty; subsequent offense; prior conviction.

Any person violating any provision of § 18.1-54 shall be guilty of a misdemeanor and shall be punished, for a first offense by a fine of not less than two hundred dollars nor more than one thousand dollars or by confinement in jail for not less than one month nor more than six months, either or both in the discretion of the jury or the court trying the case without a jury. Any person convicted within any period of ten years of a second or other subsequent offense under § 18.1-54, or convicted of a first offense under § 18.1-54 after having been convicted within a period of ten years prior thereto of an offense under former § 18-75, shall be punishable by a fine of not less than two hundred dollars nor more than one thousand dollars and by confinement in jail for not less than one month nor more than

one year. For the purposes of this section a conviction or finding of not innocent in the case of a juvenile under the provisions of § 18.1-54, former § 18-75, the ordinance of any county, city or town in this State or the laws of any other state substantially similar to the provisions of §§ 18.1-54 through 18.1-57 of the Code shall be considered a prior conviction. (Code 1950, § 18-76; 1954, c. 406; 1958, c. 357; 1960, c. 358; 1962, c. 302.)

§ 18.1-54 Driving automobiles, engines, etc. while intoxicated.

It shall be unlawful for any person to drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, brandy, rum, whisky, gin, wine, beer, lager beer, ale, porter, stout or any other liquid beverage or article containing alcohol or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. (Code 1950, § 18-75; 1960, c. 358.)

Title 4 Alcoholic Beverages and Industrial Alcohol § 4-28 Beverages sold at retail only at government stores; mixed beverages excepted.

No alcoholic beverage having an alcoholic content of more than fourteen per centum by volume shall be sold at retail in the State of Virginia, except at government stores or except by licensees under the provisions of chapter 1.1 (§ 4-98.1 et seq.) of this title. Nothing in this section shall be construed to prohibit sales by druggists as authorized by § 4-49, nor such sales as are authorized by § 4-85. (1942, p. 503; Michie Code 1942, § 4675(18c); 1958, c. 395; 1968, c. 7.)

United States Constitution

Article I, Section 9, Clause 3. Bill of attainder and ex post facto laws.

"No Bill of Attainder or ex post facto Law shall be passed."

Amendment VIII - Excessive Bail, Fines, Punishments.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV - Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Mrs. Thompson was charged with violation of Section 18.1-58, Code of Virginia, 1950, as amended, providing for increased punishment of second or subsequent offenses within a ten-year period. The above Code provision was amended in 1962 by Virginia's General Assembly to constitute a

totally new statute, which, on the facts now before this Court, operates in such a manner as to contradict the express provisions of Article I, Section 9, of the United States Constitution.

At the trial of this case, the petitioner was charged and convicted by a jury verdict, under consistent instructions from the trial court, as a second offender under Section 18.1-58, Code of Virginia, as amended. The Commonwealth introduced into evidence a certified copy of the driving record of Petitioner Thompson duly obtained from the Division of Motor Vehicles (Transcript, p. 15). Said record contained information which indicated that Mrs. Thompson had been convicted on August 9, 1961, of the offense of driving while under the influence of intoxicants by the County Court of Fluvanna County, Virginia. The offense leading to that conviction had occurred on July 10, 1961.

Conviction of Petitioner as a second offender in 1969 requires that a conviction which occurred prior to the enactment of the new criminal statute in 1962 be utilized by the Commonwealth. This constitutes an exercise in ex post facto legislation by the General Assembly of Virginia contrary to the provisions of Article I, Section 9 of the United States Constitution. In the United States Constitution restrictions are imposed upon the power of the state's legislature in such a manner as to forbid ex post facto legislation.

Section 18.1-58, Code of Virginia, 1950, as amended, currently provides, in part, that:

"Any person convicted within any period of ten years of a second or other subsequent offense under § 18.1-54, or convicted within a period of ten years prior thereto of an offense under former § 18-75, shall be punishable by a fine of not

less than two hundred dollars nor more than one thousand dollars and by confinement in jail for not less than one month nor more than one year."

Prior to the amendments enacted by the General Assembly in 1962, the language of Section 18.1-58 provided for a minimum fine of one hundred dollars. Thus the amendment of 1962 changed the minimum punishment applicable to one convicted under the statute.

The ex post facto element is established by:

(1) Petitioner's first conviction in 1961;
(2) an increase in punishment accomplished by statutory amendment in 1962;
(3) a second conviction in 1969 with actual punishment increased because of the 1961 conviction.

The above Constitutional point with regard to ex post facto violation was raised specifically at trial by special motion and preserved in the record for the Supreme Court of Appeals (see Transcript, p. ii - iv). The judge overruled the motion and exception was taken as required under the rules of procedure for the Commonwealth of Virginia.

With regard to facts of importance to Petitioner's second point, the petitioner established through testimony of hers and of her mother that she was in fact an alcoholic, had been an alcoholic for the past ten years, had been confined in a state mental institution for alcoholism on numerous occasions, and had been declared by the Courts of the Commonwealth of Virginia to be in fact an alcoholic on numerous occasions (see Transcript, p. 1 - 6 and p. 26 - 33). Counsel moved below in the trial court to introduce evidence of Petitioner's alcoholism. The court below ruled that such

evidence was irrelevant. The defense took exception (see Transcript, p. 6).

REASONS FOR GRANTING THE WRIT

Petitioner urges that a law which later inflicts greater punishment than authorized at the time of commission of the crime is ex post facto and has been so established in American common law since the United States Supreme Court decision in Calder v. Bull, 3 Dall. (U.S.) 386, (1798). In the words of Justice Chase (at p. 390): "I will state what laws I consider ex post facto laws, within the words and intent of the prohibition. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." The statute under which Petitioner's punishment was set was amended, and by amendment republished as a new statute, subsequent to the occurrence of the event necessary to support that degree of punishment. This is clearly ex post facto in nature and contrary to the language and meaning of Calder v. Bull, supra, as well as the United States Constitution.

It is the position of Petitioner that the reasoning of Rand v. Commonwealth, 9 Gratt (50 Va.) 738 (1852), the leading Virginia decision on point, is erroneous. It is an obvious fact that the imposition upon Petitioner of a greater punishment for an offense for which she was convicted in 1969, solely because of a prior conviction which occurred before the statute was amended in 1962, constitutes an ex post facto operation of the 1962 statute. The additional punishment is a consequence of the first offense. Without the prior conviction, the mandatory fine and imprisonment provided for the second offender under Section 18.1-58 becomes discretionary. The section provides that for a first offender the penalty may be either

fine or imprisonment or both at the discretion of the jury or the court trying the case without a jury, for a second offense incarceration and fine are mandatory.

The Rand decision at pp. 743-744 recognized the obvious element of ex post facto legislation in the situation then before it, which corresponds to the situation presented here. However, it sought to explain away the unconstitutionality by labelling the increased punishment for the second offense as not a necessary consequence of the first offense. The court there reasoned that the consequence was not necessary since it could arise only on the conviction for the second offense, and was one, therefore, of which Petitioner had notice and was free to avoid.

Such a position serves only as an attempt to dismiss by astute language an undeniable element of ex post facto-ism presented by the factual undercarriage of the case. Were such a stance adopted generally in matters of constitutional import, then any transgression of constitutional mandate could be justified by providing those whose rights were to be denied with notice by publication of the law itself. This notification of impending denial of right would then justify transgressions of any sort.

It appears at best specious reasoning to say that the passage of a law which makes an act illegal at enactment, or increases punishment for an act that was not illegal and did not merit that punishment, serves itself as notice, therefore obviating the necessity of complying with the proscriptions of Article I, Section 9, Clause 3 of the United States Constitution. The history of ex post facto laws decided in the Federal Courts for the past 170 years runs complete-

ly contrary to this conception. U.S. v. Hall, CAPA 1809, 26 Fed Case No. 15,285, affirmed 3 Led 189; U.S. v. Platt, D.C. Tex. 1940, 31 F. Supp. 788; Thomson v. Utah, 18 Supreme Court 620, 170 U.S. 343.

There has been some attempt to confuse legislation with regard to automotive offenses by classifying these as civil in nature. It is quite true that there is much administrative and civil sanction with regard to the licensing of persons in the Commonwealth of Virginia for the driving of automobiles. However, none of these administrative remedies available to the State, such as the revocation of license, the seizure of an automobile as property security, is at issue here. At issue is the precise criminal sanction demanded by the state in terms of fine and imprisonment. There has been no pretense, nor indeed any attempt to state that this is not a criminal statute. The statute is plain; it is simple; it requires a minimum of a month and up to one year in jail and a $200.00 fine for a second conviction, and that second conviction is to be computed ten years prior in time, regardless of whether such extension of time going backwards carries us past the enactment of the statute under which the person is charged. The statute when enacted was blatant in its disregard for acts committed prior to the statute, itself. Indeed, it is respectfully suggested that if the various state legislatures are allowed with the same casuality to enact similar statutes, the land will be inundated with ex post facto legislation in the truest sense. If a legislature can go back ten years in time prior to the enactment of a statute, itself, for acts which would justify greater infliction of criminal punishment, what is to prevent them from going back 20, 30, or 50 years in time?

Indeed, what is to prevent them from adopting those astounding laws that were seen during the rule of the Third Reich, when persons were branded criminals for acts which took place prior to their birth. Acts of conception in preceding centuries became a crime. The act of being born a Jew became a crime; the act of being born a Pole became a crime; the act of being born a Russian became another type of crime. The notice of these acts were duly pronounced according to law, and everybody knew of their enactment. Of course nobody could really do anything about these acts and the laws referred to of course were later condemned by an outraged, if ravaged, world. Yet one sees in the toughened criminal legislation of this type that same disregard for the legal concept of fair play, that same ignoring of violation of basic Constitutional principles founded on human decency and justness, that same knowledgeable ignorance of cause and effect that have taken place all too often in those societies no longer worthy of, or courageous enough, to live as free men.

The men who passed this legislation were not ignorant, they were for the most part attorneys and the concept of ex post facto-ism must have been staring them squarely in the face.

There is something horrific in state legislatures that will blatantly pass legislation which they know to be unconstitutional. And yet if we do not in our courts stop each such incursion with speed and decisive stroke, we find ourselves as we do today, with a system of justice that says one thing, but in reality means another.

With regard to Petitioner's second point, the petitioner is well aware of this Court's ruling in Powell v. State of Texas, 392 U.S. 514, 1968, which decision stopped the trend which had been

developed in Robinson v. State of California, 370 U.S. 660, 1962; Driver v. Hinnant, 356 F 2d 761 (4th Circ. 1966); Easter v. District of Columbia, 361 F. 2d 50 (D.C. Cir. 1966), and others.

It is the height of irony that the Commonwealth of Virginia and many of its sister states, license liquor, tax liquor, and in this case, sell liquor, and then in the sanctimony of its societal cloak, charge people criminally as chronic alcoholics, or as in this case, for an act of intoxication while driving.

The age of ignorance continues well into the 20th century and the prejudices which we call our rationale go right with them.

Is there anything sillier, more irrational, more "Alice-in-Wonderland", than for a state to license and sell liquor, and then charge people for being alcoholics?

In our common parlance we would say that the person is not being charged for drinking liquor, but is being charged for overindulgence. We thus reach the crowning heights of our ignorance. The overindulgence is not a matter of will, because it has been brought to our attention again and again that chronic alcoholism is a widely-recognized medical disease (Cecil and Loeb, a Textbook of Medicine, at 1625, (10th Ed. 1959)). The above, gentlemen, define an alcoholic "as a person whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, and interpersonal relationships, and their satisfactory social and economic functioning." This is a very sophisticated description of a person who is taking a narcotic, which alcohol is, and is in a state of narcoticism, which alcohol

produces, and which has been known by the world at large to have such effect since time immemorial.

The World Health Organization defines alcoholism as a chronic illness that manifests itself as a disorder of behavior (Public Health Service Publication, No. 730, "Alcoholism", National Institute of Mental Health, National Institutes of Health, U.S. Department of Health, Education and Welfare (1965)).

Judge Bryant of the 4th Circuit, speaking for a majority in Driver v. Hinnant, supra, said "The drinker may develop a tolerance to alcohol so that the same amount produces progressively less effect, and he craves larger and larger amounts. Eventually he must keep on drinking in order to avoid the severe and painful symptoms that result from abrupt withdrawal of alcohol."

Does what Judge Bryant describe mean anything different than that same craving dependency, pain and withdrawal which this Court has seen time and time and time again in a slew of narcotic cases. Indeed, it is respectfully pointed out to this Court that the term "narcotic" is not a chemical one, but is medical. It means addictive, habit-forming. It does not mean heroid, or cocaine.

Even the United States Congress, a body which can be greatly misinformed, and on the subject of narcotics, is, as early as 1947, after exhaustive hearings upon the subject of alcoholism, approved a statute for the District of Columbia (D.C. Code Section 24-502), which defined the term "chronic alcoholic" as "any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverage . . ." (Hearings on H.R. 496 before Subcommittee on Health,

Education, Recreation of the House Committee on the District of Columbia, 80th Cong. 1st Sess. (1947)). The investigation involved in the study of alcoholism by that Congress was exhaustive. The fact that no funds were ever provided under the statute to treat this disease was a disgrace to our Nation's Capital, and continues as a plague in the District. (See Easter v. U.S., supra.) Yet over 20 years after Congress got around to defining alcoholism, we are still in the dark recesses of the Middle Ages, using incarceratory purging, moralisms, and other insensitized and cruel methods of dealing with what should be solely and exclusively a medical problem. Indeed, Hall, in an article entitled "Intoxication and Criminal Responsibility" 57 Harvard Law Review, 1945, 1073 (1944) chastized the judiciaries' long-standing refusal to recognize alcoholism as a medical disease. "The disparity between judicial and available knowledge is indicated by the need to point out that one of the commonest of expert agreement is that alcoholic addiction (dipsomania), is a disease." And yet the plethora of heavy-handed criminal sanction goes on and the problem worsens.

We would not, I think, allow a police administrator to treat cancer, leukemia, or even schizophrenia. We would immediately contend that such matters were outside the realm of his specialty, his knowledge, his ability, and his experience. Yet I suspect that because most of us drink alcohol, we think that we know something about it. And because we think we know something about it, we indulge ourselves as experts when such expertize is non-existent. The bench, the public, the drinker, knows no more about alcohol than the air we breathe. A segment of our scientific community is learning something about alcohol, the same as it is learning something about the air we breathe.

If our ignorance is appalling, we must consider how even more appalling the application of that ignorance in specific instances must be.

Judge Bryant fell back upon this Court's greatest case on the necessity of intent to crime, Morisette v. U.S., 342 U.S. 246, 72 Sup. Ct. 240 (1952), in support of his contention that although a defendant's actions comprised the physical elements of a crime, no crime has been perpetrated "because the conduct was not executed by an evil intent nor accompanied by a consciousness of wrongdoing, indespensable ingredients of a crime." Driver, supra, page 764. What a sorry sight was Powell v. State of Texas, supra, in the shadow of the Morisette opinion.

If this general condemnation of the judiciary for the handling of the alcoholic problem seems harsh, one need only think how much more harsh it must be for a pitiable creature such as the petitioner, Virginia Thompson, to feel the heavy weight of retribution pushing her into humiliation, degredation, and loss of liberty for an act over which she has absolutely no control.

If this writer can voice nothing but disgust with the judiciary handling of this matter, one need only think of the thousands upon thousands, or perhaps millions of Virginia Thompsons faced with a god-awful dilemna of a disease that nobody wants to be cognizant of, including the highest court in the land.

The state will argue, and perhaps this court as well, that society must be protected. How does society protect itself against the insane, against the ailing, against the persons who have contagious diseases? Does society find it necessary to inflict criminal punishment upon persons who have tuberculosis or any other disease?

Is it not time to admit that we have as a nation collectively, and individually, been dealing in ignorance and pomposity, with a subject about which we know nothing? Is it not time for this court to recognize the infliction of this injustice, and to right it? Is it too simple a thing to simply say that we have been wrong, and now we must try to do right? Is our society so complex and so sophisticated that we are no longer capable of simple and direct reasoning? Can we no longer right a wrong?

It is perfectly true that the gentlemen of the 19th century punished alcoholics as criminals, and did worse things than that to them, and to the insane. But I would ask that the Court consider what those same gentlemen would have done if they had available to them the knowledge that this Court has. It is possible to excuse the actions of those who acted who thought they were doing right no matter how much damage they did in their zealousness. What, however, is to be said of persons who are too sophisticated and delicately poised upon compromise, to do a simple act of rightness when they see it?

Is not the gulf that divides and tears the youth of our nation today from our institutions, including our judiciary, in large part due to the inability of the judicial system to be direct, to be forthright, and above all to be honest with, itself?

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Alvin D. Edelson, Esquire
Counsel for Petitioner

September 1970

Certificate of Service

I hereby certify that I have served by mail, postage prepaid, this _____ day of September, 1970, three copies of the above Petition for a Writ of Certiorari to the Honorable Andrew P. Miller, Attorney General for the Commonwealth of Virginia. I further certify that all parties to be served in this action have been served by service upon the Office of the Attorney General.

_____
Alvin D. Edelson, Esquire
Counsel for Petitioner